No. 22,786

IN THE

United States Court of Appeals

For the Ninth Circuit

OPERATING ENGINEERS LOCAL UNION NO. 3, an unincorporated association, THE INTERNATIONAL UNION OF OPERATING ENGINEERS, an unincorporated association, HAROLD L. BOWEN, JAMES F. CHURCH, P. H. McCARTHY, JR., et al.,

Appellants,

vs.

B. R. BURROUGHS,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division

APPELLANTS' CLOSING BRIEF

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ISSUES

Without agreeing with Appellees' statement of the issues but in an effort to state Appellants' position, attention is directed to Appellee's statement, page 6, Appellee's Brief.

Appellee would state the first issue as follows.

"1. Whether a labor organization may discipline one of its members solely because it decides

that he filed a lawsuit against it without first exhausting internal union remedies for a period of four months?"

Appellants using the same approach would state it as follows:

"Whether a Labor Organization may, the doctrine of exhaustion of internal Union remedies being applicable, discipline one of its members because the member elects to seek an injunction in the Civil Courts without exhausting his internal, intra-Union remedies for a period of not more than four (4) months?"

Appellee would state the second issue as follows:

"2. Whether, in view of the charges which formed the basis of appellee's discipline, his good faith is an issue in this litigation?"

Appellant would state it as follows:

"Whether in view of the fact that the Appellee defended at his intra-Union trial upon the ground of good faith, his good faith is an issue?"

Appellee states his third issue as follows:

"3. Whether the decision of the International Union conditionally suspending the enforcement of appellee's discipline rendered the permanent injunction of the district court unnecessary?"

Appellant in the light of the oral opinion of the Trial Court which puts a "gloss" on its order would state it as follows:

"Whether the decision of the International Union suspending the enforcement of the Local Union's fines, conditioned on the continued good

> faith of Appellee for three years, without any claim that the Local Union would not or had not abided this decision, rendered the permanent injunction unnecessary."

We prefer, however, to rest on the issues as stated in Appellants' Brief under the title "Specification of Errors".

SUMMARY OF ARGUMENT

We end where we started.

Did Congress intend to change existing substantive law? The answer we submit is no.

Did Congress intend to change existing adjective law and to place a limitation on the time during which a member must exhaust available internal intra-Union remedies? The answer is yes.

Both *NLRB v. Industrial Union of Marine and Shipbuilding Workers etc.*.....US.....20 L ed 2d 706 (1968) and *Local 138 International Union of Operating Engineers and Charles S. Skura,* 148 NLRB 679, support the answers given above and the Argument in Appellants' Brief.

29 USC 411 (a)(4) provides:

> "No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, ..."

However, in the cases relied upon by Appellee, the member did not institute an action in any court, nor did he institute a proceeding before any Administrative Body.

The member in those cases invoked a disciplinary arm of the Executive Branch of the Federal Government to vindicate an Employee right (not a Membership right) guaranteed by the National Labor Relations Act.

In those cases an Employee in his capacity as an Employee complained to the General Counsel of the National Labor Relations Board charging that a right given him as an Employee by the National Labor Relations Act has been violated. After investigation the General Counsel believing that a violation of the Employee's Statutory Right had occurred, the General Counsel, not the Employee, issued a complaint and proceeded against the Union the General Counsel believing the Union had violated the Employee's Statutory Right.

The rights there involved were not Member's rights. They were Employee's rights, since except for the Union Shop Provision in Section 8(a)(3) of that Act, Union membership or lack of it are of no moment and it was not involved.

Thus we find the Supreme Court in *NLRB v. Industrial Union of Marine and Shipbuilding Workers, etc.*.....US.....(supra), says:

> "We held in National Labor Relations Board v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 65 LRRM 2449, that § 8(b)(1)(A) does not pre-

vent a union from imposing fines on members who cross a picket line created to implement an authorized strike. The strike, we said, 'is the ultimate weapon in labor's arsenal for achieving agreement upon its terms' and the power to fine or expel a strikebreaker 'is essential if the union is to be an effective bargaining agent.'" Id. at 181.

"Thus § 8(b)(1)(A) assures a union freedom of self-regulation where its legitimate internal affairs are concerned. But where a union rule penalizes a member for filing an unfair labor practice charge with the Board, other considerations of public policy come into play.

(p. 712.)

* * * * * * * * *

". . . . A healthy interplay of the forces governed and protected by the Act means that there should be as great a freedom to ask the Board for relief as there is to petition any other department of government for a redress of grievances. Any coercion used to discourage, retard, or defeat that access is beyond the legitimate interests of a labor organization. That was the philosophy of the Board in the Skura case. Local 138, International Union of Operating Engineers, 148 NLRB 679, 57 LRRM 1009; and we agree that the overriding public interests makes unimpeded access to the Board the only healthy alternative, except and unless plaintly internal affairs of the union are involved."

(p. 714.)

* * * * * * * * *

"We conclude that unions were authorized to have hearing procedures for processing grievances of members, provided those procedures did

> not consume more than four months of time; but that a court or agency might consider whether a particular procedure was 'reasonable' and entertain the complaint even though those procedures had not been 'exhausted.' We also conclude, for reasons stated earlier in this opinion, that where the complaint or grievance does not concern an internal union matter, but touches a part of the public domain covered by the Act, failure to resort to any intra-union grievance procedure is not grounds for expulsion from a union. We hold that the Board properly entertained the complaint of Holder and that its order should be enforced."
>
> (p. 714.)

Here the "reasonableness of the procedures", Internal Intra-Union Remedy, was not attacked by Appellee in either lawsuit. In fact the "reasonableness of the procedures" was approved *in Edsberg v. Local Union No. 12 I.U.O.E.,* 30 F 2d 785 (1962.)

Obviously the doctrine of exhaustion of internal Intra-Union remedies has no application to the Federal Government when the Federal Government through its duly constituted officers proceeds against the person complained of by another.

Had the Appellee taken his complaint to the Secretary of Labor as advised by the Superior Court so to do, there would be no question of his right so to do.

To hold that the doctrine of exhaustion of internal intra-Union remedies has no application to a proceeding instituted in the name of the United States or one of its administrative arms by one of the prose-

cuting officers of the Federal Government is not to hold that the statute here involved wiped out the doctrine of exhaustion of internal Union remedies.

Certainly the Secretary of Labor or the General Counsel of the National Labor Relations Board have no internal, intra-Union remedies to exhaust.

With respect to Appellee's issue of Good Faith—since no question was raised as to the conduct of the trial, neither a transcript of the trial nor the affidavit of Appellee read at the trial is before this Court; however, the affidavit of T. J. Stapleton, undenied, which is before the Court sets out the facts which completely negative the claim of "good faith". (R 169-178.)

CONCLUSION

We are not here dealing with a question of expulsion or loss of job rights or job opportunities of an employee who is a member of a Labor Union. We are here concerned with the question of whether or not a Union of 32,000 members with substantial contractual and other obligations operating in five states may lawfully insist that no member has the right to disrupt its operations and bring them to a standstill without first exhausting internal intra-Union remedies and reasonable hearing procedures for a period of at least four months before appealing to the Civil Courts.

For as stated by the Congressional Committee:

> "One final point is significant. Since union business must not be brought to a standstill when-

> ever an election is challenged, it is necessary to make some provision for the conduct of business while the proceeding is in progress."
>
> Legislative History of the Labor-Management Reporting and Disclosure Act of 1959—published by N.L.R.B., U.S. Govt. Printing Office, 1959, p. 417.

This Congress did in Title IV of that Act.

Appellee, however, did not concur in the position and action of the Congress but sought to create the very problems Congress sought to avoid. He sought to bring the business of the Union to a standstill by challenging an election.

Under the doctrine of exhaustion of Union remedies as developed by the Courts, both the Union and its members know where they stand, and so far as there may be certitude in law, it here exists.

For this Appellee would substitute the mental state of a member bringing a civil action, and as a result the essential Congressional purpose, responsible Unions to deal responsibly with their members and management would be destroyed.

It is clear that it was not the intent of Congress in the field of Labor-Management Relations to substitute uncertainty for certainty or to take from Unions the authority to require their members to be equally responsible and to act within the framework of reasonable regulations, reasonably enforced.

Appellants respectfully submit that the District Court's order granting Summary Judgment should be

reversed and the Complaint dismissed for failing to state a claim on which relief may be granted.

Dated, San Francisco, California,
October 10, 1968.

Respectfully submitted,
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